

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KK, SK, and NK, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DAVID L. KAY,

Respondent-Appellant,

and

PAMELA JEAN KAY,

Respondent.

UNPUBLISHED

August 5, 2008

No. 281162

Oakland Circuit Court

Family Division

LC No. 06-728503-NA

In the Matter of KK, SK, and NK, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

PAMELA JEAN KAY,

Respondent-Appellant,

and

DAVID L. KAY,

No. 282060

Oakland Circuit Court

Family Division

LC No. 06-728503-NA

Respondent.

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

In Docket No. 281162, respondent David Kay appeals as of right from the order terminating his parental rights to the minor children, KK (d/o/b 2/1/91), SK (d/o/b 5/5/92), and NK (d/o/b 12/21/94), apparently¹ under MCL 712A.19b(3)(b)(i) (physical abuse to child or sibling), (b)(ii) (sexual or physical abuse, failure to protect), (g) (failure to provide proper care or custody), (j) (reasonable likelihood of harm if child returns to parents' home), and (n)(i) (conviction of criminal sexual conduct [CSC]) and/or (n)(ii) (assaultive crime and habitual offender). In Docket No. 282060, respondent Pamela Kay appeals as of right from the order terminating her rights to the minor children, apparently under subsections (b)(ii), (g), and/or (j). The appeals were consolidated.

I. Basic Facts and Proceedings

Respondents were married from 1990 to 2000; the default judgment of divorce granted joint legal custody to respondents, physical custody to respondent mother, and reasonable visitation to respondent father. The instant proceedings arose after DHS filed a request for action seeking removal of the children from respondents' care and custody. The request for action was based on investigative findings that SK had sexually assaulted NK, that respondent father had physically assaulted KK and that respondent father, in 1992 or 1993, sexually assaulted an 11-year old girl. A referee, on December 1, 2006, conducted a preliminary hearing in which respondents did not dispute the above investigative findings. The referee also elicited an admission from respondents that respondent father's status as a sex offender was not conveyed to the judge presiding over their divorce. The referee returned KK and NK to the custody of respondent mother with an order that she cooperate with the DHS. The referee also ordered that respondent father have supervised visitation.

The referee conducted a second preliminary hearing on December 13, 2006, in which the respondents waived probable cause as to the petition. The petition only sought to terminate respondent father's parental rights. The petition detailed two incidents of SK sexually assaulting NK, one of which occurred where respondent father resided. Also, the petition indicated that SK may have been molested by "[d]ad or some man," and that NK had previously been sexually molested at the age of four by someone called, "Grandpa Ronnie." The petition also cited previous history of DHS involvement. Specifically, the petition indicated that after respondent father assaulted KK, DHS offered counseling to the children, but there is no evidence that respondent mother took advantage of those services. In its report, the referee specifically noted that "[t]here is no evidence that the respondent parents knew of SK's sexual conduct prior to the time of the police investigation in 2006." The referee recommended authorization of the petition

¹ The court did not state statutory grounds.

to terminate respondent father's parental rights, and maintained custody of KK and NK with respondent mother.

The court conducted a pretrial hearing on January 8, 2007. At the hearing, the guardian ad litem (GAL) raised concerns that there were communications about the case in respondent mother's home, and that NK may feel she must defend respondent mother. The GAL also indicated that the DHS worker had expressed concerns about the relationship between NK and KK. The court reiterated that there was to be no discussion in regard to the case.

On March 14, 2007, the court heard an emergency placement hearing. The DHS represented that DHS caseworker, Tonya Griffith, had indicated that SK disclosed that he had been molested by KK. In addition, when respondent mother contacted another caseworker, Kristine Freeman, Freeman overheard KK in the background admitting to sexual acts with SK.² Freeman also indicated that respondent mother laughed at KK's statement and stated, "that's just nasty." Further, Griffith and respondent mother's therapist, Ruth Kusiak, both believed that respondent mother continued to minimize that sexual abuse occurred in her home and was unable to protect her children against incestuous relationships. The court ordered that KK and NK be taken into DHS custody and that an amended petition be filed.

Before trial, respondent father pleaded no contest to the petition and requested a best interests hearing. In regard to respondent mother, the trial court conducted a 2-day bench trial. Subsequently, the trial court read its findings and conclusions on the record and terminated respondent Pamela Kay's parental rights.

II. Docket No. 282060 (respondent mother)

A. Termination of Parental Rights

1. Standard of Review

Termination of parental rights is appropriate where petitioner proves by clear and convincing evidence at least one ground for termination. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Once this has occurred, the court shall terminate parental rights unless it finds that the termination is clearly not in the best interests of the children. *Trejo, supra*, 462 Mich at 364-365; MCL 712A.19b(5). This Court reviews the lower court's findings under the clearly erroneous standard. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999); MCR 3.977(J). A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000).

² KK allegedly stated that he and SK had "consensual homosexual incestuous intercourse" and that "he pitched and I caught."

2. Analysis

Respondent mother argues that the trial court clearly erred in terminating her parental rights. We disagree.

Here, the trial court rejected respondent mother's testimony that she could not have been unaware that sexual abuse was occurring in the home. The trial court first found that it did not believe respondent mother's testimony. The trial court noted that during respondent mother's testimony "every witness, other than NK, at some point lied or mis-stated what had gone on." The trial court also noted that since respondent mother had been a victim of sexual abuse as a young girl, it was doubtful "that all this sexual abuse could be going on in her home without any scintilla of recognition by her that it was taking place." The trial court indicated concern that respondent mother remained in a relationship with respondent father for six years after he was convicted of CSC upon a young girl, in addition to him being abusive to her and the children. Also, respondent mother made no attempt to place any supervisory restriction on respondent father's access to the children, and that at least one act of CSC occurred between the siblings during visitation. In this regard, the trial court specifically found not credible respondent mother's claim that she informed the divorce court of respondent father's CSC conviction. The trial court noted that, in its experience, had the CSC conviction been mentioned, the divorce court certainly would have addressed it. The trial court also found that respondent mother minimized the seriousness of the abuse that occurred in her home.

We conclude that the record supports the trial court's findings and cannot conclude that the trial court clearly erred in terminating respondent mother's parental rights. Specifically, the record supports the conclusion that a long-standing environment of sexual abuse existed in the home, which respondent mother either accepted as normal or refused to recognize as wholly inappropriate. Respondent father early on in the marriage committed the first reported sexual abuse against an 11-year-old girl. He was convicted of CSC and incarcerated. Next, a family friend, Ramos, sexually abused NK and he was convicted and incarcerated. There was testimony at trial suggesting that Ramos sexually abused both SK and KK. Further, NK testified that "dad or some man" sexually abused SK. Then, the children, at ages ranging tender years to adolescence, began engaging each other in sexual intercourse. There is no dispute that SK and NK engaged in sexual relations. Further, there is evidence supporting SK's disclosure that he and KK engaged in sexual activity and, when asked, KK pleaded the Fifth Amendment. There is also an allegation of sexual activity between KK and NK. Given that respondent mother knew of some of this rampant sexual abuse that occurred within her family, the trial court could readily conclude that respondent mother was neglectful in failing to recognize any of the later occurring sexual abuse.

Further, the record also supports the trial court's conclusion that there remains a reasonable likelihood that the children will suffer injury or abuse in the foreseeable future if placed in the mother's home. As mentioned, there was ample evidence that respondent mother continues to minimize the seriousness of the abuse that occurred in her home. For instance, Griffith testified that "Pam did what I asked her to do, yes, that's true, but she really didn't believe her kids needed counseling, she believed everything was okay." Specifically, Griffith cited an instance in which she asked respondent mother how other people view her children's

interaction as inappropriate, and she responded, “oh, no they just don’t understand, that’s just the way my children act with each other.” Griffith attempted to further explain that the children’s behavior was inappropriate, but Pam dismissed her, saying, “well, whatever.” Other times she indicated, “I’m just doing this because [DHS] is making me.”

Further, Rusiak testified that her “concern would be again that [respondent-mother] didn’t know how to protect [NK] from the alleged sexual abuse, didn’t know how to listen to [NK], didn’t know how to respond.” Although respondent mother claimed that she could not communicate with NK in regard to the case because of a court order, Rusiak testified that respondent mother could nonetheless support NK. Rusiak also testified that, during counseling sessions, respondent mother was more concerned with SK being removed from the house than NK’s well-being. Further, Rusiak testified that respondent mother only admitted that SK did anything wrong after SK disclosed sexual relationships between himself and KK, and KK and NK. Accordingly we cannot conclude that the trial court committed error in finding at least one of the statutory grounds was established.

B. Best Interests of the Children

1. Standard of Review

Once a statutory ground for termination is established, the trial court must terminate parental rights unless termination clearly is not in the child’s best interests. MCL 712A.19b(5); *In re Trejo, supra*, at 353. The trial court’s decision on the best interests question is reviewed for clear error. *Id.* at 356-357.

2. Analysis

Respondent mother argues that the trial court clearly erred in terminating her parental rights. We disagree.

The record indicates that KK was charged with delinquency and apparently entered a sexual offender treatment program at Holy Cross in December 2007. KK will be 18 in February 2009. Respondent mother did not believe that KK or SK would return home as children because they would not finish their counseling programs before becoming adults. NK, who is 13, will start high school in the fall. She wished to live with respondent mother. Dr. Stullberg, respondent mother’s counselor, testified that, with respondent father and SK gone, and with continued therapy for the children and respondent mother, there was no reason to believe NK would be at risk in her home. However, Dr. Stullberg did indicate that she could not recommend reunification until respondent mother addressed her own issues of victimization, which could possibly take from six months to one year.

At the best interests hearing, caseworker Freeman opined that reunification was not in the best interests of the children. Freeman admitted that the children have bonded with respondent mother. However, Freeman testified that respondent mother needed to address her past history of sexual abuse and that NK and KK required extensive counseling. Freeman believed that resolution of past sexual abuse issues could not occur within a reasonable time, and thus, did not agree with reunification. Freeman also testified that returning only NK to respondent mother’s

home would nonetheless be harmful because respondent mother has previously demonstrated a failure to protect NK from sexual abuse.

The trial court also mentioned that it had referred the parties to undergo a psychological evaluation. The report indicated that respondent mother, at that time the report was created, did not accept responsibility for the sexual abuse. Essentially the report indicated that respondent mother believed that because she did not know of the abuse that it was not her fault. The trial court noted that this assessment was consistent with Kusiak's earlier reports. The trial court also noted that the report indicated that SK and KK could easily transition from not living with their mother.

We conclude that the trial court's conclusion that termination of the respondent mother's parental rights was not clearly contrary to the children's best interest is not clearly erroneous. There is no question that given the rampant sexual abuse occurring within the family that substantial progress in counseling would be required before reunification is possible. Although Dr. Stullberg believed that respondent mother no longer minimized the sexual abuse, she also testified that respondent mother was merely "starting to" address her refusal to accept responsibility for the sexual abuse and failure to recognize boundaries between the children. Although respondent mother's progress in therapy is laudable and Dr. Stullberg believes that reunification is possible, we cannot conclude the trial court clearly erred in terminating respondent's mother parental rights. Here, the trial court considered the close bond between respondent mother and the children, particularly NK, and concluded that the potential for future abuse outweighed this bond. Given the severity of the sexual abuse that occurred in this case, we cannot conclude that the trial court's conclusion is clearly erroneous.

III. Docket No. 281162 (respondent father)

The sole issue raised on appeal by respondent father is that termination of his parental rights was against the best interest of the children. We find no merit in this argument. We conclude that clear and convincing evidence supports the trial court's ruling that termination of the father parental rights was not clearly contrary to the children's best interests.

Respondent father admitted that knew he was overly critical and short-tempered with the children, and he had been convicted for severely beating KK in 2005. He also abused respondent mother, abused the children other times, and was convicted of CSC with an 11-year-old girl. In addition, he had no realistic plan for keeping the children safe should more than one of them be permitted to stay at his house. As the GAL argues, he could identify how he hurt his children but demonstrated no ability to learn and change. Moreover, none of the children had a close bond with respondent father. They wanted a relationship with him because he was their father, and NK testified that they shared some good experiences. Still, she did not particularly want to see him and favored termination of his rights. Further, KK and SK would soon be old enough to see

him regardless of the trial court's ruling. The evidence showed that termination of his rights was not clearly contrary to any of the children's best interests, and thus the court did not clearly err in its ruling.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen